

Winter 2003

Applying the Responsible Corporate Officer Doctrine outside the Public Welfare Context

Amiad Kushner

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>



Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Amiad Kushner, Applying the Responsible Corporate Officer Doctrine outside the Public Welfare Context, 93 J. Crim. L. & Criminology 681 (2002-2003)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

APPLYING THE RESPONSIBLE CORPORATE OFFICER DOCTRINE OUTSIDE THE PUBLIC WELFARE CONTEXT

AMIAD KUSHNER*

As corporate scandals have returned to the front pages, it may be an appropriate time to reconsider the responsible corporate officer ("RCO") doctrine, a striking yet seldom-used innovation in the criminal law.¹ The doctrine holds a corporate officer vicariously liable for the criminal violation of a subordinate, where the officer occupies a position of responsibility and authority in the corporation, has the power to prevent the violation, and fails to do so.² It imposes liability upon officers for the illegal acts of *other corporate agents*, without proof that the officers directly participated in or authorized the crime.³ The doctrine presents an opportunity to modernize the criminal law in order to address the difficulty of proving that a senior

* B.A. Chicago, 1997, J.D. Northwestern, 2003. I would like to thank my wife Anna for her encouragement and support throughout the writing of this Comment. I also thank Anna's parents, Iosif and Margarita, and her grandmother Rose, for welcoming me into the home in which many of these pages were written. I thank my parents, Howard and Rachel, for making education a priority and for instilling in me the desire for knowledge. Finally I owe many thanks to Professor Stephen Presser, who carefully read a draft and made incisive suggestions, and Professor Paul Robinson, whose fascinating and systematic approach to criminal law is largely responsible for my own interest in this field.

¹ The doctrine originated in two Supreme Court decisions which affirmed convictions of corporate officers for food and drug violations. See *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975). See cases discussed in detail *infra* Part II.

² *Park*, 421 U.S. at 673-74.

³ See Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses-Another View*, 35 VAND. L. REV. 1337, 1343 (1984) (noting that *Park* and *Dotterweich* imposed criminal liability upon officers who did not personally participate in the activity constituting the violation).

officer authorized a subordinate's criminal act.⁴ Classical criminal law, in seeking to prove that an officer directed or authorized a criminal act, is frustrated by the ease with which the origin of a criminal decision is lost in bureaucracy.⁵ It clings to an archaic common law emphasis on overt criminal acts,⁶ blinding itself to the corporate prime mover who disguises his transactions among routine corporate events, acting exclusively through subordinates scattered throughout an amorphous bureaucracy.⁷ Sophisticated crimes by corporate officers are difficult to detect, and in an advanced industrial economy they threaten society *en masse*,⁸ by means of toxic waste, misbranded drugs, or securities fraud.⁹ In response to the historic elusiveness of crimes by corporate officers, the RCO doctrine

⁴ While the RCO doctrine originated in applying strict liability statutes to corporate officers, this Comment argues that the doctrine may be applied to corporate crime generally. See *infra* Part II.

⁵ See, e.g., Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 430-31 (1963) (prosecuting senior corporate officers is difficult because liability depends upon demonstrating their affirmative participation in the illegal acts of subordinates).

⁶ See, e.g., Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 69 (1933) ("The old cumbrous machinery of the criminal law, designed to try the subjective blameworthiness of individual offenders, is not adapted for exercising petty regulation on a wholesale scale . . ."). See also Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the "Formative Era,"* 6 LAW & HUM. BEHAV. 191, 209 (1982) (discussing the emphasis on free will in the common law, which viewed each actor as a moral agent choosing between lawful and unlawful conduct, and which was reinforced by American individualism); Gerhard O. W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957) ("The common law is a creation by individuals for individuals. Organized aggregations of private individuals had little influence in its making.").

⁷ See, e.g., Denis J. Hauptly & Nancy L. Rider, *The Proposed Federal Criminal Code and White-Collar Crime*, 47 GEO. WASH. L. REV. 523, 525 (noting the difficulty of identifying the responsible participants in complex schemes, who often "tailor" their activity to escape liability under criminal statutes).

⁸ Cf. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1135-45 (1995) (noting that prior to the development of a national economy and the invention of railroads, automobiles, and aircraft, crime was thought to be an essentially local matter).

⁹ See *Morisette v. United States*, 342 U.S. 246, 254 (1952) (noting that the large scale distribution of goods after the Industrial Revolution has become an instrument of wide distribution of harm); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2420-21 (1995).

imputes, in limited situations, the acts of the corporation to its officers.¹⁰

The RCO doctrine has been unwisely viewed as a special rule to be applied exclusively to “public welfare offenses,” such as the food and drug violations implicated in the seminal RCO cases.¹¹ The strongest rationale for the doctrine does not lie in the *activity* sought to be regulated, but in the elusiveness of the *defendant* sought to be prosecuted.¹² The vast expansion of the modern economy, combined with the proliferation of large international corporations, suggests that the classical public welfare doctrine is outdated as a controlling concept of an expanded officer liability regime. The Supreme Court has narrowed the scope of the public welfare doctrine,¹³ suggesting that it is an inadequate basis upon which to construct a coherent and vigorous theory of officer liability.¹⁴ Courts have applied the RCO doctrine to felony prosecutions under environmental laws, placing only nominal reliance on the inherited traditional public welfare rationale.¹⁵ A reexamination of the RCO doctrine is necessary, in order to explain recent developments and to guide the application of the doctrine to new offense contexts.

This Comment argues that the RCO doctrine, although originally developed in response to misdemeanor prosecutions for public welfare violations, should be recast as a general theory of criminal liability of corporate officers. It is a flexible tool which is a powerful

¹⁰ Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L. J. 609, 618 n.27, 633-34, 670 (1984) (discussing the imputation of objective offense elements to officers as a specialized form of vicarious liability, in which the conduct elements of an offense are imputed to officials who arguably have “caused” the illegal acts by creating or contributing to a dangerous situation in which the acts occur); see also *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991) (noting in dicta that willful or negligent culpability may be imputed to responsible corporate officers under the Clean Water Act).

¹¹ See *infra* Part III (criticizing the use of the public welfare doctrine as a rationale for imputing criminal participation to officers).

¹² See *infra* Parts I, II (discussing the evidentiary difficulties involved in prosecuting corporate officers and arguing that courts should permit the use of RCO doctrine to overcome them).

¹³ See, e.g., *Staples v. United States*, 511 U.S. 600, 604-19 (1994) (declining to impose strict liability under a statute banning the possession of machine guns, because even a “public welfare” statute cannot be applied so as to criminalize innocent conduct—in this case gun ownership).

¹⁴ See John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1110 (1999) (arguing that recent decisions have severely undermined the public welfare doctrine by weakening the constitutional basis of strict liability in general).

¹⁵ See *infra* Part III.

antidote to the bureaucratic concealment which shields criminal actors in a modern corporation. As the successful application of the doctrine to environmental crimes indicates, the doctrine should be applied outside of the classical public welfare context to crimes with *mens rea* requirements. Part I describes the inherent limitations on the liability of corporate officers for criminal acts performed by subordinates. Part II analyzes the origins and development of the RCO doctrine. Part III critiques the association of the RCO doctrine with "public welfare" offenses. Part IV describes the application of the doctrine in the context of environmental crimes and proposes a new application to *per se* violations of the Sherman Act. Part V concludes with some general observations.

I. THE WEAKNESS OF CURRENT DOCTRINE: RESTRICTIONS ON THE LIABILITY OF CORPORATE OFFICERS FOR ACTS PERFORMED BY OTHER CORPORATE AGENTS

Whereas a corporation is liable for crimes of its agents acting on its behalf in the scope of their employment,¹⁶ a corporate officer is generally not liable unless he *personally* participates in¹⁷ or aids and abets¹⁸ a criminal act.¹⁹ When personal participation or express

¹⁶ Under the doctrine of *respondeat superior*, a corporation is vicariously liable for a criminal act of an agent where the act is within the scope of the agent's employment and is done with intent to benefit the corporation. See *N.Y. Central & Hudson River R.R. v. United States*, 212 U.S. 481, 494-95 (1909). Liability may attach even where the corporation expressly forbade the act and made good faith efforts to prevent it. See Charles R. Nesson, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1249-50 (1979) [hereinafter *Developments in the Law*]. Under the "superior agent" rule, however, corporate liability may be restricted to acts authorized by the board of directors or senior managers. See WAYNE R. LAFAVE, *CRIMINAL LAW* 272 (3d ed. 2000). The Model Penal Code restricts corporate liability to noncriminal "violations," and to criminal offenses only if the relevant statute expressly applies to corporations. MODEL PENAL CODE § 1.04(5), 2.07(1)(a)-(b) (1962). The violation must have been authorized or recklessly tolerated by the board of directors or a high managerial agent. *Id.* § 2.07(1)(c).

¹⁷ See generally 3A WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1348 (perm. ed., rev. vol. 1990) (citing cases which emphasize personal participation). It is also necessary that the officer participate in the acts with criminal intent, except in strict liability offenses lacking *mens rea* requirements. See generally Sayre, *supra* note 6 (discussing the range of public welfare offenses imposing strict liability).

¹⁸ Aiding and abetting liability requires affirmative participation in the crime or encouragement of the criminal actor. See *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'") (quoting *United*

authorization is shown, it is no defense that the crime was committed on behalf of the corporation.²⁰ But an officer cannot be held liable for acts performed by other corporate agents unless it can be proved that they acted under the officer's direction or with his permission.²¹ This requirement is rooted in agency principles: the officer as principal can only be liable for the crimes of a subordinate who was acting as his agent.²² Thus, the law draws a clear distinction between affirmative authorization of subordinates' acts, which is sufficient for liability,²³ and passive acquiescence or even knowledge of such acts, which is insufficient standing alone.²⁴

States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)). Courts generally require a showing of a wrongful act in order to justify liability. *See, e.g.*, United States v. Searan, 259 F.3d 434, 444 (6th Cir. 2001) (requiring an "act on the part of the defendant which contributes to the execution of a crime") (quoting United States v. Phillips, 664 F.2d 971, 1011 (5th Cir. 1981)); United States v. Self, 2 F.3d 1071, 1088-89 (10th Cir. 1993) (finding that the defendant aided and abetted his subordinate's illegal storage of hazardous waste by *directing* that the waste be stored in a concealed location); United States v. Belt, 574 F.2d 1234, 1240 (5th Cir. 1978) (noting that aiding and abetting liability requires proof of an overt act).

¹⁹ Similarly, the "corporate veil" protects an officer from debts arising out of the corporation's wrongful acts, but does not insulate him from liability for personal misconduct. *See, e.g.*, Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, 195 F.3d 953, 955-56 (7th Cir. 1999). A thorough analysis of officer liability in tort is beyond the scope of this Comment, which will analyze criminal liability exclusively.

²⁰ *See, e.g.*, United States v. Wise, 370 U.S. 405, 416 (1962) (holding a corporate officer criminally liable for knowingly participating in an illegal conspiracy under the Sherman Act, irrespective of whether he acted in a "representative capacity"); United States v. Amrep Corp., 560 F.2d 539, 545 (2d Cir. 1977) ("Where . . . the prosecution introduces evidence of active and knowing participation by corporate officers, they are equally liable with the corporation."). *See also* MODEL PENAL CODE § 2.07(6)(a).

²¹ *See generally* FLETCHER, *supra* note 17, § 1349 (citing cases in which emphasize direction or authorization). *Cf.* United States v. Laffal, 83 A.2d 871, 872 (D.C. Cir. 1951) (noting that while the general rule requires that officers must personally authorize a criminal act, personal involvement need not be shown where the corporation itself is an illegal business).

²² *See generally* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702-08 (1930) (concluding that courts hold a principal criminally liable for acts which he "causes" his agent to perform, either by express encouragement or knowing acquiescence).

²³ *See, e.g.*, United States v. Berger, 456 F.2d 1349, 1352 (2d Cir. 1972) (affirming aiding and abetting liability of president and chief executive officer whose "willful affirmative acts" included directing a bookkeeper to remove invoices of a foreign subsidiary as part of a tax-evasion scheme).

²⁴ *See, e.g.*, United States v. Aarons, 718 F.2d 188, 190-93 (6th Cir. 1983) (rejecting aiding and abetting liability of corporate officer who knew that others were making false statements to a government agency, because the officer did not affirmatively encourage the making of those statements); KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS §

It is extraordinarily difficult, however, to prove that a corporate officer authorized the criminal act of a subordinate, because such authorization is rarely documented.²⁵ A powerful executive with vast control over corporate operations can easily create the impression that he did not know the details of illegal activity.²⁶ To some extent the law encourages this concealment, because many statutes explicitly require proof of an affirmative illegal act before imposing liability upon an officer.²⁷

In some cases, juries are permitted to infer knowing authorization from circumstantial evidence, yet these cases typically involve small, closely-held corporations where the inference is compelling.²⁸ In a closely-held corporation, an officer often closely

5:09, at 164 (2d ed. 1984) ("Mere presence at the scene of the crime, association with the perpetrator, and knowledge of illegal activity . . . are insufficient standing alone, as is mere approval or acquiescence unaccompanied by expressed concurrence or other contribution to the crime."). See also Tony McAdams & C. Burk Tower, *Personal Accountability in the Corporate Sector*, 16 AM. BUS. L.J. 67, 68 (1978) (distinguishing between aiding and abetting liability and liability for wrongful acts of subordinates).

²⁵ See, e.g., Ronald R. Sims & Margaret P. Spencer, *Understanding Corporate Misconduct: An Overview and Discussion*, in CORPORATE MISCONDUCT: THE LEGAL, SOCIETAL AND MANAGEMENT ISSUES 1, 11-12 (Ronald R. Sims & Margaret P. Spencer eds., 1995) (noting that senior officers can easily disguise misconduct in a large organization, as in one case in which officers instituted compliance policies in order to conceal their approval of misconduct).

²⁶ See, e.g., *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995) (noting that an officer who exercises complete control over corporate operations may avoid confronting the details of illegal toxic waste disposal, making it difficult to impose liability); Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862, 883 (1991) (noting that in environmental prosecutions knowledge is easier to assign to a low-level employee who handles hazardous waste than to a senior executive).

²⁷ See, e.g., *People v. Byrne*, 570 N.E.2d 1066, 1068-69 (N.Y. 1991) (construing NY Penal Law to limit individual liability for corporate criminal acts to defendants who caused to be performed or personally performed illegal conduct).

²⁸ See, e.g., *Commonwealth v. Shafer*, 202 A.2d 308, 313 (Pa. 1964) (stating that president and principal officer may be held criminally liable for failure to collect sales taxes if he "personally dominated and controlled all the affairs of the corporation"); *Carr v. State*, 16 So. 150, 154 (Ala. 1893) (holding bank president criminally responsible for the acceptance of a deposit by the bank's sole employee after it became insolvent, where the defendant's control over the employee was so complete that he effectively accepted the deposit personally); *State v. Gilbert*, 251 N.W. 478, 487 (Wis. 1933) (permitting the inference that directors knowingly authorized fraudulent conversion, where defendants authorized checks drawing on the converted funds, were informed of unauthorized bond sales, and discussed repaying the converted funds); *State v. Comer*, 28 P.2d 1027, 1032 (Wash. 1934) (affirming conviction of president for improperly diverting trust funds, where the defendant was the corporation's majority stockholder and determined its policies and procedures).

supervises and has intimate knowledge of *all* business operations, justifying the inference that the criminal act was performed under that officer's direction or with his express or implied consent.²⁹ For example, in *United States v. Andreadis*,³⁰ an officer who dominated a closely-held corporation³¹ was charged with mail and wire fraud arising out of a scheme to market fraudulent weight loss pills.³² The advertisements for the pills contained extravagant and scientifically false claims,³³ which the defendant officer knew were false because of repeated protestations by officials in industry and government.³⁴ Nevertheless, the prosecution lacked direct evidence that the officer had instructed the advertising agency to make what he knew to be false claims.³⁵ The court, however, permitted the *inference* of such knowing authorization from circumstantial evidence, because the officer reviewed and approved the advertising strategy³⁶ and had even interviewed the "endorsers" who claimed to have lost weight using the pills.³⁷ Thus, the deciding factor was the officer's controlling and intimate supervision of the illegal marketing plan, regardless of the

²⁹ Compare *Commonwealth v. Stone*, 144 A.2d 614, 616 (Pa. 1958) (affirming conviction of president of a collection agency for fraudulent conversion of client funds, where the defendant controlled all bank accounts and was the only one authorized to sign checks) with *Bourgeois v. Commonwealth*, 227 S.E.2d 714, 718 (Va. 1976) (reversing conviction of company president where the state lacked evidence that the defendant personally controlled all employees and finances, and thus could not prove that he authorized all fraudulent requests for reimbursement).

³⁰ 366 F.2d 423 (2d Cir. 1966); see also *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1129 (3d Cir. 1979) (holding that a jury may infer from circumstantial evidence that defendants willfully discharged pollutants into a creek, so that direct evidence of "someone turning on a valve or diverting wastes" is not required).

³¹ See *Andreadis*, 366 F.2d at 427 n.3 (stating that because the defendant officer effectively "was" the corporation, both could be referred to by using the officer's name).

³² *Id.* at 426.

³³ *Id.* at 427.

³⁴ *Id.* at 428-29 (noting that the National Better Business Bureau had informed the defendant of scientific objections to the pills, and that the Kansas State Board of Health refused to allow the pills to be advertised in Kansas). The court noted in dicta that even if the officer was unaware of the falsity of the advertising, he had an affirmative duty to insure that its claims were true. See *id.* at 430 (citing *United States v. Baren*, 305 F.2d 527, 532 (2d Cir. 1962); *Stone v. United States*, 113 F.2d 70, 75 (6th Cir. 1940)).

³⁵ See *Andreadis*, 366 F.2d at 430 ("The Government did not prove that [the defendant officer] specifically directed [the agency] to advertise the factually false claims, knowing them to be false, but as he reviewed and approved the 'live' endorser campaign this does not insulate him from liability for their propagation.") (citing *Harris v. United States*, 261 F.2d 792, 796 (9th Cir. 1958)).

³⁶ *Id.*

³⁷ *Id.* at 429-30.

fact that the advertisements were physically produced by an independent advertising agency.³⁸ Because of the pervasive control which the officer exercised over the advertising campaign, the court appropriately referred to the advertising firm as the officer's agent.³⁹ Without proof of an agency relationship, however, an officer cannot be held liable for mere "knowledge plus acquiescence;" there must be evidence of affirmative authorization.⁴⁰

Although a trier of fact is permitted to infer that an officer knowingly authorized a criminal act when he exercises complete control over the direct criminal actors, such pervasive control is exceedingly difficult to prove, as illustrated by *Bourgeois v. Commonwealth*.⁴¹ Bourgeois was the president of Revco, a corporation which trained people to operate trucks.⁴² He was held liable in the trial court for defrauding a state program which reimbursed companies for providing job training to disabled persons.⁴³ The prosecution presented evidence that twenty-four disabled students had paid Revco for some of the cost of their training, yet Revco fraudulently sought reimbursement for the full cost of the training from the state.⁴⁴ One student gave \$200 in cash directly to Bourgeois as partial payment for the course, which Bourgeois then recorded on a signed receipt, yet Revco proceeded to bill the state for \$795, the full cost of the training.⁴⁵ The Virginia Supreme Court reversed Bourgeois' conviction, however, because the prosecution failed to prove that he had personally authorized *each* fraudulent reimbursement presented into evidence.⁴⁶ The court noted that the State had not proved that Bourgeois controlled all of Revco's employees or its funds, noting that a vice-president also had authority

³⁸ See *id.* at 430.

³⁹ See *id.* at n.10 (noting that the Kastor-Hilton advertising firm was acting as Andreadis' agent).

⁴⁰ See Sayre, *supra* note 22, at 702 (noting that a principal is only liable for acts of his agent which he is causally responsible for). Current doctrine thus has a restricted view of when a subordinate is the agent of a superior officer for the purposes of officer liability and an expansive view of employees as the corporation's agents for the purposes of corporate liability. As explained above, any employee acting in the scope of his employment with intent to benefit the corporation is the "agent" of the corporation for the purposes of corporate liability.

⁴¹ 227 S.E.2d 714 (Va. 1976).

⁴² *Id.* at 715.

⁴³ Bourgeois was convicted of grand larceny. See *id.*

⁴⁴ *Id.* at 718.

⁴⁵ *Id.* at 717.

⁴⁶ *Id.* at 718.

to sign checks on behalf of Revco.⁴⁷ This case illustrates the difficulty of holding an officer liable for subordinates' acts, because only in rare cases is an officer's control so pervasive that it compels the inference that he authorized the criminal acts.⁴⁸

Bourgeois demonstrates that mere knowledge of a criminal violation is insufficient to incriminate an officer, because the officer might lack complete *power* over the criminal activity and thus may not have been responsible for authorizing it.⁴⁹ This requirement applies even in strict liability offenses; although it is unnecessary to prove that the officer *knew* the facts constituting the violation, the prosecution still needs to show that the officer either personally committed the illegal act or completely controlled the subordinates who did.⁵⁰ On the other hand, in an offense with a *mens rea* requirement, power alone without culpable knowledge is insufficient, because it would allow a guilty subordinate to automatically implicate his superior.⁵¹ Thus, in the vast majority of cases the

⁴⁷ *Id.* at 718-19.

⁴⁸ *See, e.g.,* Commonwealth v. Stone, 144 A.2d 614 (Pa. 1958) (affirming conviction of president of a collection agency for fraudulent conversion of client funds, where the defendant controlled all bank accounts and was the only one authorized to sign checks).

⁴⁹ *See also* People v. Int'l Steel Corp., 226 P.2d 587, 592-93 (Cal. App. Dep't Super. Ct. 1951) (reversing conviction of corporate secretary for illegal pollution caused by burning automobile bodies, where the defendant knew of the illegal activity but as a mere "ministerial officer" he lacked "authority to transact the business of the corporation upon his independent volition and judgment").

⁵⁰ *See, e.g.,* People v. Lieber, 304 P.2d 869, 872 (Cal. 1956) (holding that if strict liability is to be imposed for receipt or possession of narcotics, a pharmacy president cannot be held liable unless "*he and he alone*" had access to the narcotics) (emphasis added); State v. Lindberg, 215 P. 41, 47 (Wash. 1923) (holding bank officer strictly liable after he *personally* borrowed funds from his bank in excess of statutory limits, despite his lack of knowledge that the funds came from the bank). A settled exception to this rule is in cases in which the corporation operates an illegal business, where all officers are presumed to have committed illegal acts. *See* Carolene Prod. Co. v. United States, 140 F.2d 61, 66 (4th Cir. 1944), *aff'd on other grounds*, 323 U.S. 18 (1944) (holding that where a corporation is engaged in an *unlawful business*, such as selling adulterated milk products, officers may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether they personally supervised the acts) (emphasis added). *Cf.* United States v. Laffal, 83 A.2d 871 (D.C. App. 1976) (permitting the inference that the president of a corporation which operated a restaurant frequented by prostitutes and drunkards failed to prevent the business from keeping disorderly house); Tenement House Dept. v. McDevitt, 109 N.E. 88, 89-90 (N.Y. 1915) (holding that a building owner generally knows whether his premises are being used for prostitution, justifying strict liability even though in some cases the illegality occurs without the owner's knowledge).

⁵¹ *See, e.g.,* People v. Brainard, 183 N.Y.S. 452, 455 (N.Y. App. Div. 1920) (holding that the criminal prosecution of a publishing company president for publishing an obscene book, done without the president's knowledge or acquiescence, "cannot be sustained, unless we are

officer must have both complete *power* over the activity giving rise to the crime and sufficient *knowledge* of the activity so that the criminal act can be shown to have been impliedly authorized.⁵²

While an officer's authorization of a criminal act is easier to infer in a closely-held corporation, where an officer is often involved in *all* decisions, such an inference is almost impossible in the context of a larger corporation, where multiple managers may have authority over an activity. The vast evidentiary differences between small and large corporations create a quasi-immunity for officers in large corporations who avoid direct connections to illegal activity.⁵³ RCO liability, by contrast, is far less constrained by the size of the corporation and the relative closeness of the officer's supervisory role.⁵⁴ The RCO doctrine permits a court, without evidence of an officer's pervasive control, to *impute* the criminal act of a subordinate to the officer.⁵⁵ The doctrine concedes that evidence that the officer authorized a criminal act may be unavailable or insufficient,⁵⁶ foreclosing liability under traditional theories.⁵⁷ However, if the RCO doctrine is applied, once a jury determines that an officer satisfies the conditions of a "responsible relationship" as a matter of

prepared to hold that the manager of a corporation is criminally liable for *every criminal act committed by any subordinate* officer of the corporation in connection with his duties in behalf of the corporation. I do not understand that any authority has asserted any such broad proposition . . .") (emphasis added).

⁵² See, e.g., *State v. Seufert*, 271 S.E.2d 756, 759 (N.C. Ct. App. 1980) ("Where the crime charged involves guilty knowledge or criminal intent, as does embezzlement, it is essential to criminal liability on the part of the officer or agent that he actually and personally did the acts which constitute the offense or that they be done by his direction or permission.").

⁵³ See *Developments in the Law*, *supra* note 16, at 1254 (noting that senior officers in large corporations can prevent subordinates from providing them with information about illegal activity, allowing them to escape liability).

⁵⁴ See *infra* Part II.

⁵⁵ *Id.*

⁵⁶ See *United States v. Park*, 421 U.S. 658, 670-71 (1975) (conceding that evidence of the officer's knowledge or personal participation in the criminal violation is not necessary for liability under the Federal Food, Drug and Cosmetic Act); see generally PAUL H. ROBINSON, CRIMINAL LAW 279-80 (1997) [hereinafter CRIMINAL LAW] (noting that doctrines of imputation are used in situations in which offense elements cannot be satisfied, such as complicity cases in which the conduct of the principal is imputed to a defendant who has not participated in the conduct constituting the crime).

⁵⁷ See *United States v. MacDonald & Watson Waste Oil Co.* 933 F.2d 35, 50-55 (1st Cir. 1991) (vacating conviction of corporate officer for knowingly transporting hazardous waste, because the jury was not permitted to *presume* that the defendant knew of the illegal shipments from the fact that he participated actively in day-to-day management and had been previously warned that his company was illegally disposing of contaminated soil).

fact,⁵⁸ criminal participation will be imputed to the officer as a matter of law.⁵⁹

II. THE ORIGINS AND DEVELOPMENT OF THE RCO DOCTRINE

A. THE CLASSICAL DOCTRINE: PUBLIC WELFARE STATUTES, STRICT LIABILITY CRIMES

The RCO doctrine originated in *United States v. Dotterweich*,⁶⁰ where the Supreme Court considered whether a corporate officer was a “person” under the enforcement provisions of the Federal Food, Drug and Cosmetic Act (“FDCA”),⁶¹ a strict liability statute.⁶² Dotterweich was the president of the Buffalo Pharmacal Company (“BPC”), which repackaged and resold drugs it purchased from wholesalers.⁶³ Both Dotterweich and BPC were charged with introducing adulterated or misbranded drugs into interstate commerce, in violation of the FDCA.⁶⁴ The Second Circuit reversed Dotterweich’s conviction on the ground that Congress meant to limit criminal liability to the corporation, so that an officer could not be considered a “person” for the purposes of criminal prosecution under the FDCA.⁶⁵ Clearly, imposing strict liability is a departure from the usual requirements of criminal law, because in a strict liability

⁵⁸ See *United States v. Iverson*, 162 F.3d 1015, 1023 (9th Cir. 1998) (“Under *Dotterweich*, whether defendant had sufficient ‘responsibility’ over the discharges to be criminally liable would be a question for the jury.”).

⁵⁹ This distinction between an inference from the facts and an imputation stemming from doctrine is emphasized in the First Circuit’s analysis in *MacDonald & Watson*. See 933 F.2d at 50-55 n.20 (noting that while a jury could permissibly *infer* an officer’s knowledge of hazardous waste shipments from his knowledge of other shipments of the same type, it could not *impute* such knowledge to the officer as a matter of law). See also *Lewis v. Welch*, 126 A.D.2d 519, 521 (N.Y. App. Div. 1987) (“[T]he employees’ criminal culpability which may be imputed to the corporation by the statute cannot be further imputed to its individual directors, whose culpability requires their ‘knowledge or privity’ in the prohibited act.”).

⁶⁰ 320 U.S. 277 (1943) (5-4 decision).

⁶¹ 21 U.S.C. § 333(a)(1)(2002) (stating that a “person” who violates the FDCA is subject to a fine and imprisonment).

⁶² *Dotterweich*, 320 U.S. at 284 (noting that the FDCA imposes a penalty without any “consciousness of wrongdoing”); see also *United States v. United States Gypsum Co.*, 438 U.S. 422, 437-38 (1978) (listing *Dotterweich* as one of several cases in which the Court has recognized a strict liability offense).

⁶³ *United States v. Buffalo Pharmacal Co. Inc.*, 131 F.2d 500, 501 (2d Cir. 1942).

⁶⁴ *Id.*

⁶⁵ *Id.* at 503. The court noted, however, that “[i]f an individual operated a corporation as his ‘alter ego’ or agent he might be the principal,” meaning that in cases of direct personal involvement the officer could be considered a “person” under the Act. See *id.*

offense no showing of *mens rea* is necessary,⁶⁶ which usually means that the defendant need not be aware of the facts constituting the violation.⁶⁷ Dotterweich's conviction, premised on a strict liability theory, was thus affirmed by the Supreme Court in spite of the fact that he did not *know* that the drugs were mislabeled.⁶⁸ In fact, there was no evidence that Dotterweich even participated in the illegal shipment.⁶⁹ The Court explained this harsh result by stating that the "circumstances of modern industrialism" endanger the health of defenseless consumers, justifying criminal prosecution of "otherwise innocent" corporate officers in "responsible" positions.⁷⁰ The RCO doctrine was thus linked with a public welfare rationale, under which public health and "danger" create an exception to normal rules of liability.⁷¹

The application of strict liability to corporate officers was reaffirmed in *United States v. Park*,⁷² where the president of a retail food chain was held liable for FDCA violations stemming from rodent infestation in company warehouses.⁷³ *Park* not only reaffirmed the imposition of strict liability in principle,⁷⁴ but applied it to a large corporation in which the defendant officer was far

⁶⁶ See generally LAFAYE, *supra* note 16, at 257-62 (discussing criminal liability for conduct without fault).

⁶⁷ See Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 108 (explaining that *mens rea* typically refers to mere awareness that the facts constitute a violation, as opposed to knowledge that those facts constitute *illegal* conduct).

⁶⁸ See *Dotterweich*, 320 U.S. at 280-81 ("The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing."). See also George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 403 n.8 (1971) (noting that in *Dotterweich*, culpability was presumed with respect to the misbranded status of the drug shipment).

⁶⁹ See *Dotterweich*, 320 U.S. at 286 ("There is no proof or claim that [Dotterweich] ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction.") (Murphy, J., dissenting).

⁷⁰ *Id.* at 280-81 (citing *United States v. Balint*, 258 U.S. 250 (1922)).

⁷¹ *Id.* (noting that the FDCA was intended to keep impure and adulterated food and drugs, as well as "illicit and noxious articles," out of the market).

⁷² 421 U.S. 658 (1975) (6-3 decision).

⁷³ *Id.* at 660-61.

⁷⁴ *Id.* at 670-71 (noting that liability may be imposed under the FDCA despite a failure to prove the officer's personal participation or knowledge of the illegal acts). Although *Park* was directly notified of the rodent infestation by the government, he argued that he had directed subordinates to correct the problem, which suggests he did not in fact know that the violations *persisted*. *Id.* at 662-64; see also *Austin v. United States*, 509 U.S. 602, 618 n.11 (1993) (noting that *Park* held a corporate officer strictly liable under the FDCA).

removed from the management of the warehouses where the violations occurred.⁷⁵ Whereas Dotterweich led a small company in which he was intimately involved in operations,⁷⁶ Park was the president of a corporation with about 36,000 employees and 874 retail outlets, and he exercised control through subordinates.⁷⁷ Park argued that he had delegated responsibility for correcting the FDCA violations to a vice-president and was informed that the problem was being addressed.⁷⁸ Despite Park's efforts, subsequent inspections found that rodent infestation persisted in the warehouses.⁷⁹ The Court, in imposing liability, noted that Park was at least aware that his subordinates were unreliable, in light of their prior failures to correct unsanitary conditions.⁸⁰ The Court interpreted the FDCA to impose a duty not only to remedy violations but to implement business practices that prevented them from occurring.⁸¹ In affirming Park's conviction, the Court stated the three black letter elements of RCO liability: an officer is criminally liable if (1) "by reason of his position in the corporation," he had (2) "responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of," and (3) "failed to do so."⁸² *Park* reaffirmed the "public welfare" rationale for RCO liability by emphasizing the need to protect the food supply⁸³ and by imposing a heightened duty upon officers who assume positions affecting public health.⁸⁴

⁷⁵ The Fourth Circuit in fact reversed Park's conviction on the ground that the prosecution had failed to allege an act or omission. See *United States v. Park*, 499 F.2d 839, 841 (4th Cir. 1974) ("It is the defendant's relation to the criminal *acts*, not merely his relation to the corporation, which the jury must consider.") (emphasis added).

⁷⁶ *United States v. Buffalo Pharmacal Co. Inc.*, 131 F.2d at 501 (noting that Dotterweich exercised general control over all operations and directed employees to fill orders received from physicians).

⁷⁷ *Park*, 421 U.S. at 660.

⁷⁸ *Id.* at 663-64.

⁷⁹ *Id.* at 661-62.

⁸⁰ *Id.* at 677-78.

⁸¹ *Id.* at 672.

⁸² *Id.* at 673-74. The critical second prong is generally referred to as the "responsible relationship" or "responsible share" test.

⁸³ *Id.* at 671 (citing *Smith v. California*, 361 U.S. 147, 152 (1959)).

⁸⁴ *Id.* at 672.

B. RESPONSIBLE RELATIONSHIP ANALYSIS: AN APPROPRIATE INNOVATION

The innovation of *Dotterweich* and *Park* was not the imposition of strict liability *per se*, which has always been controversial,⁸⁵ but the imposition of strict liability on officers who had not *directly participated* in the violations.⁸⁶ Because a strict liability offense has no *mens rea* requirement,⁸⁷ it was not necessary to show that Dotterweich knew that the drugs were misbranded, or that Park knew that the warehouses remained unsanitary.⁸⁸ Even in a strict liability offense, however, there must be a showing of a voluntary *act* or an

⁸⁵ See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422-25 (1958) (arguing that strict criminal liability punishes the blameless, and that the "open and official admission that crime can be respectable and criminality a matter of ill-chance" causes "shocking damage . . . to social morale"); Packer, *supra* note 67, at 109 (discussing the "consensus" view that criminal liability should not be imposed without a *mens rea* requirement).

⁸⁶ The main policy criticism (as opposed to moral objection) is that if strict liability is to be imposed it should be limited to defendants who are in a position to take greater care to prevent violations. See, e.g., *Developments in the Law: The Federal Food, Drug, and Cosmetic Act*, 67 HARV. L. REV. 632, 695 (1954) [hereinafter *Developments in the Law-FDCA*] (conceding that strict liability under the FDCA may motivate corporations to select and supervise employees with greater care, yet criticizing the potential prosecution of companies already operating under strict standards because "as a practical matter, [they] cannot be expected to take greater precautions"). See also William McVisk, *Toward a Rational Theory of Criminal Liability for the Corporate Executive*, 69 J. CRIM. L. & CRIMINOLOGY 75, 88 (1978) (noting that by failing to provide a defense to officers who have taken care to prevent violations, the Court has failed to provide an incentive to exercise care).

⁸⁷ See, e.g., *United States v. Freed*, 401 U.S. 601 (1971) (holding that liability for unlawful possession of hand grenades does not require a showing of *mens rea*).

⁸⁸ Because of the harshness of this strict liability standard, decisions to bring criminal charges under the FDCA generally take into account factors such as "the prospective defendant's awareness of the violation, his past record, and the seriousness of the offense." See *Developments in the Law-FDCA*, *supra* note 86, at 696. The Supreme Court has suggested, however, that even in a strict liability offense the defendant must have knowledge of *facts* sufficient to separate wrongful from innocent conduct. See, e.g., *Staples v. United States*, 511 U.S. 600 (1994) (holding that a strict liability statute criminalizing the possession of an unregistered machine gun requires knowledge that the firearm can be used as an automatic weapon, so as to avoid criminalizing the innocent activity of gun ownership). But these decisions expressly exclude "limited circumstances" such as the situation in *Dotterweich*, where knowledge of the facts constituting the violation was not required because the defendant, as a responsible officer, was aware of the probability of strict regulation. See *id.* at 607 (noting that while in a strict liability offense the defendant must be aware that he is dealing with a dangerous item, such awareness is presumed where defendants routinely handle such items, so that the burden is on these defendants to determine whether their conduct constitutes a violation) (citing *United States v. Balint*, 258 U.S. 250, 254 (1922)).

omission to perform a duty of which the actor is capable.⁸⁹ The relevant question is whether the actor participated in the prohibited conduct or caused the illegal result.⁹⁰ Thus, in *Dotterweich* and *Park*, the prosecutors alleged that the defendants' *acts* or failures to act had *caused* the prohibited result—adulterated food or mislabeled drugs.⁹¹ In theory, such participation indicates that the actor was at least negligent, although proof of negligence is of course not required in a strict liability offense.⁹²

When strict liability is sought to be imposed upon a corporate officer, however, the “acts” constituting the violation are typically not performed by the defendant, as demonstrated by *Park*’s lack of personal involvement in the operation of the warehouses.⁹³ Consequently, the RCO doctrine is best understood as an *imputation* of the acts constituting the violation to the officer.⁹⁴ It is a form of vicarious liability in which senior officers may be held criminally responsible for the acts of low-level employees.⁹⁵ By imputing the

⁸⁹ See CRIMINAL LAW, *supra* note 56, at 141 (discussing the *actus reus* offense requirement).

⁹⁰ See LAFAYE, *supra* note 16, at 265.

⁹¹ See *Park*, 421 U.S. 658, 660 (1975) (quoting the indictment which charged defendants with causing food to be held in a building accessible to rodents and to be contaminated by them). See also Robinson, *supra* note 10, at 668 (discussing a “causal” rationale for the liability imposed in *Park*, according to which liability is justified because defendants “caused” a dangerous situation); *Developments in the Law*, *supra* note 16, at 1262 (“The Supreme Court has declared that no inquiry into the intent of the actor is required to establish liability under [the FDCA and a few other federal statutes], only a finding that the defendant’s conduct or neglect constitutes a proximate cause of the violation.”) (citing *Park*, 421 U.S. at 672-74; *Dotterweich*, 320 U.S. at 284-85).

⁹² Strict liability, even in a vicarious sense, is generally limited to situations in which the defendant is presumptively negligent. See, e.g., *Austin v. United States*, 509 U.S. 602, 617-18 (1993) (noting that the forfeiture of property arising out of a drug possession conviction, imposed on a strict, vicarious liability theory, is premised on the owner’s negligence). See also Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 744 (1960) (noting that “strict liability statutes require an antecedent judgment of *per se* unreasonableness”); CRIMINAL LAW, *supra* note 56, at 287-88 (discussing strict liability as a form of “codified imputation,” where a culpable mental state need not be shown because it is imputed to the actor in situations where negligence is presumed).

⁹³ Cf. *State v. Lindberg*, 215 Pac. 41 (1923) (holding bank officer strictly liable after he personally borrowed funds from his bank in excess of statutory limits).

⁹⁴ See *supra* note 9; Packer, *supra* note 67, at 116-19 (explaining that in *Dotterweich*, strict liability merely relieved the prosecution of the burden of showing *culpability*, such as negligence—whereas the imposition of vicarious liability implicated the entirely different question whether *Dotterweich* could be liable absent any *personal participation* in the illegal shipment).

⁹⁵ See, e.g., *State v. Beaudry*, 365 N.W.2d 593 (Wis. 1985) (holding corporate agent vicariously liable where a subordinate kept a tavern open past the legal closing time).

acts of subordinates to officers, vicarious liability also eliminates the rigid requirement that an actor proximately "cause" the harm through his acts.⁹⁶

The reliance on vicarious liability in *Dotterweich* and *Park* has elicited severe criticism from commentators.⁹⁷ With some exceptions,⁹⁸ most commentators have assumed that the Supreme Court did not mean to impose a pure form of vicarious liability, but meant to impose liability only upon officers whose conduct was at least negligent.⁹⁹ On the latter view, although a responsible corporate officer might possess formal power to prevent the illegal conduct of a subordinate, the officer would not be liable without proof of negligence.¹⁰⁰

⁹⁶ *Park* did not hold that the officer's acts had caused the violation, but that the officer's "responsible relationship" sufficed as a *proxy* for proof of proximate cause. See *Park*, 421 U.S. at 674 ("The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a *sufficient* causal link.") (emphasis added); McAdams & Tower, *supra* note 24, at 70-71 (noting that the Court did not require the prosecution to "pinpoint" a specific act or omission by *Park* that had caused the violation). Moreover, whenever an actor is sought to be held liable for the criminal act of another, "causation" is always problematic because of the presence of an intervening will. Cf. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 327 (1985) (arguing that an agent's voluntary act *cannot* be "caused" in a physical sense by a principal, because in the final analysis the agent freely chose to act). See also Robinson, *supra* note 10, at 634 n.89 (noting that a "causal" theory is less applicable to *Park* than other vicarious liability cases).

⁹⁷ See, e.g., LAFAYE, *supra* note 16, at 268 (noting that *Dotterweich* is an "outrageous" example of a court assuming that strict liability offense also justifies vicarious liability).

⁹⁸ Brickley, *supra* note 3, at 1356-57 (While *Dotterweich*'s facts suggest the presence of negligence, the case involved a classic public welfare offense and is properly interpreted to impose strict liability.); Steven Zipperman, *The Park Doctrine - Application of Strict Criminal Liability to Corporate Individuals for Violation of Environmental Crimes*, 10 UCLA J. ENVTL. L. & POL'Y 123, 129 (1991); CRIMINAL LAW, *supra* note 57, at 356-58 (While *Park* held that the Constitution does not bar vicarious liability of corporate officers, courts have limited its application to strict liability offenses).

⁹⁹ See, e.g., *Dotterweich*, 320 U.S. at 287 ("The fact that a corporate officer is both a 'person' and an 'individual' is not indicative of an intent to place vicarious liability on the officer.") (Murphy, J., dissenting); *Park*, 421 U.S. at 683 (Officer liability under *Dotterweich* requires a finding of "wrongful conduct amounting at least to common-law negligence.") (Stewart, J., dissenting); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 848-49 (1999) (concluding that *Dotterweich*'s conviction required a "*mens rea* of 'imperfect care'"); Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses - A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 469-70 (1981) (interpreting *Park* to impose a negligence standard which, while not equivalent to a common law "ordinary care" standard, is nevertheless a "slight" negligence standard requiring *extraordinary* care).

¹⁰⁰ See, e.g., Developments in the Law, *supra* note 16, at 1262 n. 102 (*Park* and *Dotterweich* do not authorize a pure form of vicarious liability, because the officers must be

Inserting a "negligence" requirement into the doctrine, however, simply begs the question of how to define negligence in the context of an officer's relationship to his subordinates. The Supreme Court likely avoided a precise definition of the scope of vicarious liability, because it is impossible to identify *ex ante* the officers having "a responsible share" in the violation.¹⁰¹ Even if criminal acts of employees may be imputed to officers, there must be some flexibility in determining *which* officers are to be liable. *Park* expressly rejected the notion that *any* corporate officer, no matter how far removed from a violation, is vicariously liable as a supervising official.¹⁰² When liability is predicated upon events of which an officer could not possibly have known about, there is a risk of criminalizing a "complete absence of relevant conduct."¹⁰³

By contrast, the RCO doctrine functions to isolate meaningful contact with a violation, precisely because the sheer size of a corporation and the far-flung duties of an officer tend to minimize the significance of such contact. In *Park*, despite the massive size of the corporation, the defendant was notified of violations by a letter from a government agency and had previously handled complaints about sanitation.¹⁰⁴ In *Dotterweich*, despite the defendant's lack of personal involvement in the illegal shipment, he directly supervised the business process that resulted in the violation.¹⁰⁵ A precise definition of responsible share would impose a rigid formula in an area in which myriad scenarios are possible.¹⁰⁶ When corporate officers are aware

shown to have failed to exercise care and as such their guilt is *not* automatic upon proof of their subordinates' guilt.).

¹⁰¹ See *Dotterweich*, 320 U.S. at 284.

¹⁰² See *Park*, 421 U.S. at 674 (approving of a jury instruction which did not permit liability to attach solely on the basis of an officer's corporate position and instead required a finding of a responsible relationship to the violation). See also *Rooney v. Commonwealth*, 500 S.E.2d 830, 833-34 (Va. App. 1998) (overturning conviction of corporate president for failing to make required deposits into a trust account, where the state failed to present evidence describing the officer's powers or duties with respect to the required deposits, thereby precluding a finding of a responsible relationship).

¹⁰³ See *Graham Hughes, Criminal Omissions*, 67 YALE L.J. 590, 602 (1958) (arguing that liability should only be imposed where an actor *ought to have known* either the relevant regulation or facts triggering regulatory requirements; otherwise the law is not addressing relevant conduct).

¹⁰⁴ *Park*, 421 U.S. at 661-62.

¹⁰⁵ *United States v. Buffalo Pharmacal Co. Inc.*, 131 F.2d at 501 (noting that *Dotterweich* exercised general control over all operations and directed employees to fill orders received from physicians).

¹⁰⁶ Cf. *Matis v. United States*, 236 B.R. 562, 570 (E.D.N.Y. 1999) (noting that in imposing personal liability upon "responsible persons" for failure to remit withholding taxes

of a precise legal limitation on liability, it is easy for them to tailor their conduct in order to escape liability.¹⁰⁷ Finally, mere lack of precision is not a bar to constitutional criminal regulation.¹⁰⁸

The responsible share concept retains the flexibility to adapt to varied corporate contexts and isolates officers who have a rational, relevant connection to the violation.¹⁰⁹ On the one hand, the concept is broad enough to encompass officers who possess a mere formal authority over the activity in question, without proof that they had actual knowledge of criminal violations.¹¹⁰ Unlike traditional theories of liability, there is no requirement that the defendant commit an affirmative wrongful act.¹¹¹ In fact, *Park* has been interpreted to require mere formal authority over the business process in which the violation occurred, as opposed to a demonstration that the officer exercised the authority in practice.¹¹² On the other hand, corporate procedures or bylaws themselves do not prove that an officer possessed actual authority, and thus are not sufficient to generate a finding of responsibility.¹¹³

to the Internal Revenue Service, courts do not simply consider the defendant's technical authority or official title but whether he has a close enough connection to the tax default so as to have been able to prevent it) (citing *Fiataruolo v. United States*, 8 F.3d 930, 939 (2d Cir.1993)).

¹⁰⁷ See Hauptly & Rider, *supra* note 7 (noting the capacity of officers to manipulate legal rules in order to escape liability).

¹⁰⁸ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (holding that regulations prohibiting obscenity do not violate due process merely because of a lack of precision); John Calvin Jeffries, Jr., *Legality, Vagueness, And The Construction of Penal Statutes*, 71 VA. L. REV. 189, 231 (1985) (arguing that the fairness of a criminal statute does not depend on the precision of its drafting, but on whether a law-abiding person in the actor's situation would have reason to avoid the proscribed conduct.). But see *Dotterweich*, 320 U.S. at 286-87 (suggesting that the FDCA does not provide adequate notice to those subject to prosecution) (Murphy, J., dissenting).

¹⁰⁹ See Robinson, *supra* note 10, at 670-71 (arguing that the "responsible relation" concept in *Dotterweich* and *Park* is "designed to establish causal responsibility through *risk creation*, or at least to increase the likelihood that an actor held liable *is in fact culpable* even though proof of his culpability is not formally required") (emphasis added).

¹¹⁰ See Brickey, *supra* note 3, at 1363-64 (contrasting *Park*'s concept of a "responsible relationship," in which an officer merely possesses a "factual" connection to the violation such that he has the power and responsibility to prevent it, with a traditionally culpable mental state).

¹¹¹ *Id.* at 1366 (noting that *Park* rejected the appellate court's holding that the prosecution must allege a specific wrongful act on the part of officer).

¹¹² See *United States v. Iverson*, 162 F.3d 1015, 1024 (9th Cir. 1998) (construing *Park* to require a showing of authority with respect to conditions underlying the violation, rather than an exercise of authority with respect to the activity) (citing *Park*, 421 U.S. at 673-74).

¹¹³ *United States v. Starr*, 535 F.2d 512, 514 (9th Cir. 1976).

Absent formal supervisory authority over the activity leading to the violation, an officer might still enter into a "responsible relationship," demonstrating the flexibility of the concept. An example of this phenomenon, as *Park* suggests, is if the officer is notified of violations by a government agency.¹¹⁴ One court has simply required that there be a "nexus" between the officer's position and the violations such that the officer could have influenced the acts constituting the violations, and that the officer's actions or inactions "facilitated" the violations.¹¹⁵ Such a nexus, it seems clear, may be found even where the officer had no physical contact with the site of the violations.¹¹⁶

In order to develop the concept of responsible relationship, courts should consider a combination of factors, such as the officer's authority in the corporation, his actual control over the relevant activity and the relevant subordinates, and the degree of notice which the officer had of the violation. The Supreme Court has accepted that the concept of responsible relationship defies precise definition, because the circumstances of each particular case are so different.¹¹⁷ An officer should never be convicted purely on the basis of his position in the corporation, as some courts assume.¹¹⁸ Courts should develop the law of responsible relationship without wedding it to a

¹¹⁴ See, e.g., *United States v. Undetermined Quantities of Articles of Drug*, 145 F. Supp. 2d 692, 705 (S.D. Md. 2001) (concluding that defendant president had a responsible relationship to transactions violating FDCA because he had strategic management authority such that he was familiar with all company operations, and because the Food and Drug Administration Warning Letter was addressed to him).

¹¹⁵ *In Re Dougherty*, 482 N.W.2d 485, 490 (Minn. App. 1992).

¹¹⁶ *United States v. Shapiro*, 491 F.2d 335, 337 (6th Cir. 1974) (holding that neither physical presence nor personal participation is required in order to impose criminal liability upon officers under the FDCA); accord *Golden Grain Macaroni Co. v. United States*, 209 F.2d 166, 168 (9th Cir. 1953).

¹¹⁷ The Court has declined to define "responsible relation." See *Dotterweich*, 320 U.S. at 285 ("It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.").

¹¹⁸ See, e.g., *United States v. Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996) ("Park had personally done nothing directly related to the charged offenses, but instead had been indicted solely for his role as CEO of the company."); *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 234 (D. Mass. 1980) ("The line drawn by the Court [in *Park*] between a conviction based on corporate position alone and one based on a 'responsible relationship' to the violation is a fine one, and arguably no wider than a corporate bylaw.").

rigid formula.¹¹⁹ The overriding objective should be to develop a set of factors suggesting criminal participation in the absence of direct evidence tying the defendant to a criminal decision.¹²⁰

There should be some clear limits to responsible relationship liability, however. Where the underlying offense is one of strict liability, courts should bear in mind that in *Dotterweich* and *Park* some negligence was most likely involved, though such a showing was not formally required.¹²¹ *Park* emphasized that an officer in a responsible relationship is presumptively blameworthy, strongly suggesting that a responsible officer cannot be so far removed from the crime that a presumption of blame would make no sense.¹²² In fact, *Park* recognized an "impossibility defense," which permits an officer in a responsible relationship to escape liability upon a showing that preventing the violation was objectively impossible.¹²³ The impossibility defense has never been successfully raised, but it highlights the fact that a showing of a "responsible relationship" is merely a *prima facie* case, and so courts should not assume that it is equivalent to liability.¹²⁴

III. ABANDONING THE PUBLIC WELFARE RATIONALE

Recently, courts have begun to apply the RCO doctrine to statutes with *mens rea* requirements, an apparent extension of the doctrine developed in *Dotterweich* and *Park*, which involved strict

¹¹⁹ See, e.g., *United States v. Iverson*, 162 F.3d 1015, 1023 (9th Cir. 1998) (noting that the Supreme Court has "refused to define the boundaries of the [RCO] doctrine . . . leaving the question for district courts and juries"); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 507 (E.D.N.Y. 1993) (noting that *Park* and *Dotterweich* stand for a "strict liability-negligence hybrid standard" in cases involving criminal liability of corporate officers) (emphasis added).

¹²⁰ See *Park*, 421 U.S. at 677-78 (noting that irrespective of the Acme corporation's practice of delegating authority over sanitary conditions to specific subordinates, the defendant [as a responsible officer] had a duty to remedy violations when those subordinates failed).

¹²¹ As Professor Brickey noted, in *Dotterweich* "not a shred of evidence that some corporate mechanism equipped to handle routinely so basic a responsibility as the accurate labeling of its products even existed." Brickey, *supra* note 3, at 1353. See *Park*, 421 U.S. at 678 (noting evidence that *Park* was on notice that he could not rely on subordinates to prevent or correct the violations, because of a pattern of prior failures by those subordinates).

¹²² *Park*, 421 U.S. at 673 (stating that the concept of responsible relationship or responsible share "imports some measure of blameworthiness").

¹²³ *Id.*

¹²⁴ *Id.* at 673-74.

liability statutes.¹²⁵ This innovative expansion of the doctrine has been inappropriately labeled as an extension of the public welfare doctrine.¹²⁶ Courts should abandon this line of justification because the limited roster of “public welfare” offenses would stifle the application of the RCO doctrine.¹²⁷ More fundamentally, as this Comment has sought to demonstrate, the RCO doctrine should be viewed as a general theory of officer liability and not as a narrow exception in public welfare prosecutions.¹²⁸

The classical public welfare doctrine was developed in order to justify a wide range of police regulations, such as traffic offenses or liquor license laws, which lacked *mens rea* requirements.¹²⁹ The primary focus of inquiry was whether depriving the defendant of the protection afforded by a *mens rea* requirement could be justified, because it offended classical criminal law.¹³⁰ The Supreme Court most famously addressed this problem in *United States v. Balint*.¹³¹ In *Balint*, the defendants were charged with selling drug derivatives

¹²⁵ John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 214 n.84 (1991) (noting that the RCO doctrine has been applied to statutes with knowing, reckless or negligent *mens rea* requirements).

¹²⁶ See, e.g., Cynthia H. Finn, Comment, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U. L. REV. 543, 545-46 (1996) (arguing that the RCO doctrine should be limited to “true” public welfare offenses); Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You Don’t Know?*, 22 ENVTL. L. 1347, 1349-50 (1992) (“It is now well established that environmental laws fall within the realm of health and welfare statutes, whose purpose is to protect the general public.”).

¹²⁷ Courts have been reluctant to expand the roster of public welfare offenses. See, e.g., *Liparota v. United States*, 471 U.S. 419, 432-33 (1985) (holding that unauthorized possession of food stamps is not a public welfare offense); *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 90-91 (2d Cir. 2000) (holding that importing wild animals or birds under inhumane conditions is not a public welfare offense); *United States v. Lynch*, 233 F.3d 1139, 1143-44 (9th Cir. 2000) (holding that excavating or altering an archeological resource located on public or Indian lands is not a public welfare offense); *United States v. Pasillas-Gaytan*, 192 F.3d 864, 869 (9th Cir. 1999) (holding that illegally procuring naturalization is not a public welfare offense); *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (holding that criminal discharge of pollutants under Clean Water Act is not a public welfare offense); *United States v. Anton*, 683 F.2d 1011, 1015 (7th Cir. 1982) (holding that an alien’s illegal presence in the U.S. after being deported or denied admission is not a public welfare offense).

¹²⁸ See *supra* Parts I, II.

¹²⁹ See *supra* notes 68-72 and accompanying text.

¹³⁰ See generally Packer, *supra* note 67 (criticizing the Supreme Court’s approval of strict liability).

¹³¹ 258 U.S. 250 (1922).

without the required written order form.¹³² The defendants claimed that they did not know that the specific drugs they sold needed to be recorded on the forms, and that the indictment was defective because it did not allege that they knew the facts constituting the violation.¹³³ The Court affirmed the conviction, justifying the imposition of strict liability on the ground that regulatory penalties, whose goal is "social betterment," should not be treated like true criminal penalties which punish immoral conduct.¹³⁴

Unfortunately, when the Supreme Court in *Dotterweich* articulated the RCO doctrine, it relied principally on *Balint*, the classic public welfare case.¹³⁵ Whereas *Balint* addressed the question whether strict liability was justified *per se*, the RCO doctrine is best viewed as a separate inquiry in which the relevant issue is not justifying strict liability but *assigning* liability.¹³⁶ The classic public welfare cases involved individual defendants or the owners of closely-held corporations,¹³⁷ for whom the distribution of liability was not a serious issue. By contrast, in a large, modern corporation multiple managers may be connected to the illegal activity, and so the distribution of liability is a critical issue. Thus, it is not surprising that Professor Sayre, in his classic analysis of public welfare offenses in 1933, made no distinction between public welfare prosecutions of corporate officers as against other defendants, a distinction which is necessary today.¹³⁸ The primary concern of an officer liability regime should be the distribution of liability among a class of potential officer defendants, each member of which might have contributed to

¹³² *Id.* at 251.

¹³³ *Id.*

¹³⁴ *Id.* at 252.

¹³⁵ In affirming *Dotterweich*'s conviction, the Court noted that public welfare legislation "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Dotterweich*, 320 U.S. at 281 (citing *Balint*, 258 U.S. at 252-53).

¹³⁶ See Robinson, *supra* note 10, at 634 (noting that "after *Park*, courts no longer require as a prerequisite for liability a close relationship between a corporate officer's activities and the criminal violation").

¹³⁷ See, e.g., Sayre, *supra* note 6, at 61 (concluding that the public welfare doctrine had "matured" in a case in which the owner of several motor cabs was convicted of a traffic offense) (citing *Provincial Motor Cab Co. v. Dunning*, 2 K.B. 599 (1909)).

¹³⁸ See, e.g., *id.* at 80 (applying a common analytical framework to a case involving a bank officer and cases involving non-corporate officer defendants).

a corporate crime.¹³⁹ The classical form of the public welfare doctrine is unsuited to resolve this problem; it must be modified to suit modern conditions. Although the doctrine provides a broad theoretical justification for imposing strict liability upon producers who harm consumers, it provides no basis upon which to distribute liability among the producer's agents.

Courts continue to cling to a public welfare rationale, however, producing tortured analyses of whether complex environmental regulations are true public welfare laws.¹⁴⁰ When a court concludes that a statute is not a public welfare offense, it obtains a ready excuse to preclude application of the RCO doctrine.¹⁴¹ This inquiry is simplistic and artificial, because it has never been clear how to define a public welfare law,¹⁴² let alone what constitutes a threat to the public welfare.¹⁴³ In fact, the Supreme Court has classified the *same* statute as a public welfare law in one application, but not others.¹⁴⁴

¹³⁹ *Developments in the Law*, *supra* note 16 (discussing criminal liability of "indirect actors").

¹⁴⁰ *See, e.g.*, *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991) (holding that the Clean Water Act is a public welfare statute); *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989) ("There can be little question that [the Resource Conservation and Recovery Act's] purposes, like those of the Food and Drug Act . . . 'touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.'") (citing *Dotterweich*, 320 U.S. at 280).

¹⁴¹ *See, e.g.*, *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991) (concluding that the RCO doctrine should be restricted to "public welfare statutes and regulations" lacking *mens rea* requirements). *See also* Coffee, *supra* note 125, at 214 (disapproving of the expansion of the RCO doctrine beyond its original strict liability setting).

¹⁴² *Compare* *Liparota v. United States*, 471 U.S. 419, 433 (1985) (noting that public welfare offenses criminalize conduct which a reasonable person should know is subject to stringent regulation and which seriously threatens public health or safety), *with* Sayre, *supra* note 22, at 720 (contrasting "regulatory" offenses in which the public interest is clear and substantial while the individual interest is limited to a small fine, with "true crime" in which the public's injury is indirect and limited to one victim while the individual defendant is threatened with imprisonment). *See* Jeremy D. Heep, *Adapting the Responsible Corporate Officer Doctrine in Light of* *United States v. MacDonald & Watson Waste Oil Co.*, 78 MINN. L. REV. 699, 702-10 (1994) (distinguishing between the "original" RCO doctrine, applied to strict liability statutes, and modern decisions which seek to apply the doctrine to offenses with *mens rea* requirements).

¹⁴³ *See, e.g.*, Zipperman, *supra* note 98 (arguing that hazardous materials pose a threat to the public welfare which justifies extension of RCO liability). *See also* Finn, *supra* note 126, at 554 (arguing that there is no "sound method" by which courts could determine which offenses pose the greatest danger to the public).

¹⁴⁴ *Compare* *United States v. Freed*, 401 U.S. 601, 609 (1971) (holding that possession of an unregistered hand grenade under the National Firearms Act is a public welfare offense) *with* *Staples v. United States*, 511 U.S. 600, 609-20 (1994) (holding that violation for

Thus the public welfare classification is subject to widespread judicial manipulation.¹⁴⁵

The most fundamental objection to the use of the public welfare doctrine to circumscribe RCO liability is that it fails to account for the unique factual context of corporate crime. Because access to the facts constituting a violation is the key to liability,¹⁴⁶ controlling significance should be given to the defendant's corporate position, because it governs his exposure to the facts of corporate operations and the identity of the principal violators. By contrast, in the classic public welfare case, there is no principled basis for presuming that a particular defendant has access to the relevant facts. For example, in *Staples v. United States*, the Supreme Court found no basis to presume that an average gun owner has sufficient expertise to recognize whether a semiautomatic firearm had been converted into a machinegun.¹⁴⁷ By contrast, in a hierarchically organized corporation, with its defined divisions and delegations of authority, it makes more sense to create a presumption that officers in a responsible relationship know some facts about the activity of their subordinates.¹⁴⁸ In fact, such a presumption is already implicit in

possession of unregistered machine gun under the National Firearms Act was not a public welfare offense because guns are not sufficiently dangerous to alert owners to the possibility of strict regulation).

¹⁴⁵ See, e.g., *Staples*, 511 U.S. at 612-13 n.6 ("Our decisions suggesting that public welfare offenses require that the defendant know that he stands in 'responsible relation to a public danger,' in no way suggest that what constitutes a public danger is a jury question. It is for courts, through interpretation of the statute, to define the mens rea required for a conviction.") (citing *Dotterweich*, 320 U.S. at 281).

¹⁴⁶ See, e.g., *id.* at 622 n.3 (1994) ("The mens rea presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that . . . 'ignorance of the law or a mistake of law is no defense to criminal prosecution.'") (citing *Cheek v. United States*, 498 U.S. 192, 199 (1991) (Ginsburg, J., concurring)); *Liparota*, 471 U.S. at 422 n.3 (holding that in order to prove defendant knowingly made an illegal use of food stamps, the government must demonstrate that the defendant both understood the law and recognized the facts which made the action illegal).

¹⁴⁷ *Staples*, 511 U.S. at 615 ("[I]n the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.").

¹⁴⁸ This is not to suggest that all corporations are the same, or that one theory explains corporate decision making. See generally Note, *Decision Making Models and the Control of Corporate Crime*, 85 YALE L.J. 1091 (1976) (discussing various models of corporate decision-making). The inquiry of the "responsible relationship" should be highly fact-specific, tailored to the circumstances of each corporate defendant.

cases involving small, closely-held corporations, as discussed above.¹⁴⁹

IV. THE MODERN RCO DOCTRINE: OFFENSES WITH *MENS REA* REQUIREMENTS

A. ENVIRONMENTAL PROSECUTIONS

In the typical RCO environmental case, the prosecution presents circumstantial evidence that the defendant had some knowledge of an environmental violation, but lacks proof that the officer authorized the illegal activity, as in *United States v. Iverson*.¹⁵⁰ The defendant, who was president and chairman of a chemical company, was convicted of violating the Clean Water Act,¹⁵¹ which prohibits “knowing” discharges of pollutants into protected waters.¹⁵² The defendant’s subordinates had cleaned drums containing hazardous waste, allowing toxic wastewater to run into the municipal sewer system.¹⁵³ The evidence indicated that the defendant *knew* about at least some of the discharges, because he was present during some of the cleanings and could observe or smell the hazardous waste.¹⁵⁴ But the defendant did not *personally* discharge all of the wastewater, and his occasional presence at the scene of the discharges does not prove that he authorized them, or that other officers had no role.¹⁵⁵ The

¹⁴⁹ See *supra* notes 28-40 and accompanying text (discussing the liability of officers in small corporations).

¹⁵⁰ 162 F.3d 1015 (9th Cir. 1998).

¹⁵¹ 33 U.S.C. §§ 1251-1387 (1994).

¹⁵² See 33 U.S.C. § 1319(c)(2) (imposing criminal penalties for “knowing” violations of the Act).

¹⁵³ *Iverson*, 162 F.3d. at 1018-19.

¹⁵⁴ *Id.*

¹⁵⁵ Arguably, the evidence permitted the *inference* that the officer authorized the illegal discharges; tellingly, the defendant allegedly told employees that, “if they got caught, the company would receive only a slap on the wrist.” *Iverson*, 162 F.3d at 1019. In addition, the evidence showed that at some times the defendant had personally discharged the waste. *Id.* at 1018. But as noted previously, evidence that a corporate officer personally participated in *one* illegal act does not establish that he participated in *all* of the illegal acts charged. See, e.g., *Bourgeois v. Commonwealth*, 227 S.E.2d 714, 718 (Va. 1976) (reversing conviction of company president where the state could not prove that the defendant authorized *all* fraudulent requests for reimbursement even where *one* request was so proved). Cf. *United States v. Self*, 2 F.3d 1071, 1088 (10th Cir. 1993) (“[W]hile knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant’s later knowledge from which the jury may draw the necessary inference.”).

district court had instructed the jury that it could impose liability if the following elements were proved:

“(1) the defendant had knowledge of the fact that pollutants were being discharged to the sewer system by employees . . . ; (2) the defendant had the authority and capacity to prevent the discharge of pollutants to the sewer system; (3) the defendant failed to prevent the on-going discharge of pollutants to the sewer system.”¹⁵⁶

This instruction masterfully applied the RCO doctrine to a statute with a *mens rea* requirement, because it permitted the imputation of the illegal *acts* of subordinates to a responsible officer while retaining the statute’s requirement that the officer have culpable *knowledge*.¹⁵⁷ Thus, the jury could conclude that the officer had authorized the violations even without proof that he had personally participated in the illegal cleanings or performed some act in furtherance of the violation.¹⁵⁸ In demonstrating that the defendant was a “responsible corporate officer,” the prosecution had to demonstrate that he had authority over the activity which gave rise to the violations and failed to stop them.¹⁵⁹ As in *Park*,¹⁶⁰ it was not necessary to show that the defendant had an express corporate duty to oversee the illegal acts (*i.e.* the cleaning of the drums) or that he in fact controlled this activity.¹⁶¹

This application of the RCO doctrine to crimes with *mens rea* requirements¹⁶² has not been accomplished by judicial fiat. Rather,

¹⁵⁶ *Iverson*, 162 F.3d at 1022.

¹⁵⁷ The Clean Water Act on its face imposes liability upon “responsible corporate officers,” incorporating the RCO doctrine. *See id.* (noting that the term “person” under the Clean Water Act includes “any responsible corporate officer”) (citing 33 U.S.C. § 1319(c)(6)).

¹⁵⁸ *Id.* at 1026 (“[T]he ‘responsible corporate officer’ instruction relieved the government *only* of having to prove that defendant *personally discharged* or *caused* the discharge of a pollutant.”) (second emphasis added).

¹⁵⁹ *See id.* at 1025.

¹⁶⁰ In *Park*, the RCO doctrine functioned to impute the criminal acts to an officer who had ultimate authority over sanitation, but did not actually control day-to-day sanitation management. It was not necessary to prove that Park *knew* the warehouses were illegally unsanitary. But in *Iverson*, the prosecution had to prove that the defendant knew that a pollutant was being discharged.

¹⁶¹ *See id.* at 1022-23 (rejecting a “narrow” interpretation of RCO liability which would require either an express duty to oversee the activity in question or actual control of the activity).

¹⁶² This application has not been limited to environmental crimes. *See, e.g.*, *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998) (stating that where a meat misbranding statute requires intent to defraud, a corporate officer may be liable for the violation upon proof that he had fraudulent intent and either personally participated in the violation *or had a responsible relationship to it*).

Congress has expressly indicated that the persons subject to liability include "responsible corporate officers," as in the Clean Water Act.¹⁶³ A growing number of state environmental statutes also expressly incorporate RCO liability.¹⁶⁴ As the Ninth Circuit concluded in *Iverson*, when Congress specified that a "person" subject to criminal liability could include a responsible corporate officer, it meant to incorporate the RCO doctrine.¹⁶⁵

Thus, the modern RCO doctrine would impose a duty upon responsible officers to prevent violations *which they know of*. One who stands in a responsible relationship to a violation, and knows of the conduct constituting the violation, is vicariously liable as if he had carried out the act. Therefore, the modern RCO doctrine requires three elements as stated by *Iverson*:

- (1) the officer knows of the conduct constituting the violation,¹⁶⁶
- (2) the officer stands in a *responsible relationship* to the conduct, and
- (3) the officer fails to prevent the conduct.¹⁶⁷

When this doctrine is compared with the general requirements for "aiding and abetting" or accomplice liability, the principal difference is that the RCO doctrine substitutes a "responsible relationship" for the traditional "act" requirement, as illustrated below:

The accomplice knows of the perpetrator's criminal objective, and¹⁶⁸

¹⁶³ 33 U.S.C. § 1319(c)(6). Although the statute does not define "responsible corporate officer," it should be viewed as an implicit delegation to courts of authority to define the content of that term. Cf. Dan M. Kahan, *Lenity And Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347, 367-81 (arguing that Congress can delegate criminal lawmaking authority to courts); *id.* at 414 ("Congress drafts criminal statutes in broad terms not because it favors limitless statutory coverage, but because it is unable or unwilling to specify the full content of criminal statutes *ex ante*.").

¹⁶⁴ See, e.g., Alabama Water Pollution Control Act, ALA.CODE § 22-22-1(b)(7) (1975) (defining "person" to include "responsible corporate officer"); COLO.REV.STAT.ANN. § 25-7-122.1(5)(b) (West 2002) (same).

¹⁶⁵ See *Iverson*, 162 F.3d at 1023 ("Because Congress used a similar definition of the term 'person' in the [Clean Water Act], we can presume that Congress intended that the principles of *Dotterweich* apply under the [Clean Water Act].").

¹⁶⁶ See *infra* note 169.

¹⁶⁷ *Iverson*, 162 F.3d at 1022.

¹⁶⁸ This element describes the culpability of the accomplice with respect to the *result* which the perpetrator seeks to achieve. See CRIMINAL LAW, *supra* note 56, at 329-330 (distinguishing between assisting the perpetrator's conduct, and knowing or intending to further the criminal result of that conduct). The corresponding requirement under the RCO

the accomplice commits an *overt act* in order to assist the perpetrator's conduct.¹⁶⁹

The RCO doctrine thus supplants the traditional rule, discussed in *Bourgeois*, that an officer cannot be criminally responsible for the act of a subordinate unless he completely controlled his conduct. A responsible relationship is a sufficient proxy for evidence of authorization.

B. LIABILITY FOR *PER SE* VIOLATIONS OF THE SHERMAN ACT: A PROPOSED APPLICATION OF THE RCO DOCTRINE TO ECONOMIC CRIMES

The RCO doctrine has never been applied to antitrust violations, but it could. In a price-fixing prosecution, the primary issue is proving that the defendant officer participated in an illegal agreement. Assuming that the class of price-fixing at issue is *per se* illegal,¹⁷⁰ it is not necessary to prove that the defendant intended to restrain trade,¹⁷¹ but only that he intended to enter into the agreement

doctrine is that the defendant officer know about the "result" of *subordinates'* conduct. For example, in *Iverson*, the court required that the defendant officer know that the subordinates were discharging pollutants. See *supra* note 157 and accompanying text. Depending on the statute at issue, there may differing requirements as to which facts the officer must know about to be liable. See, e.g., Barbara DiTata, *Proof Of Knowledge Under RCRA And Use of The Responsible Corporate Officer Doctrine*, 7 FORD. ENV'T'L. L. J. 795, 800-07 (discussing the Resource Conservation and Recovery Act's knowledge requirement, which is ambiguous with respect to whether the defendant must know that material is hazardous or whether a permit is required).

¹⁶⁹ For aiding and abetting liability to attach, the accomplice cannot assist the perpetrator by accident, but must know or intend that his acts assist the perpetrator's conduct. See CRIMINAL LAW, *supra* note 56, at 333 (arguing that the "better view" is that the accomplice must purposefully assist the perpetrator's conduct). By contrast, the RCO doctrine is predicated on the absence of *any* affirmative assistance, so there is no culpability requirement relating to such assistance. See *supra* note 96 and accompanying text (discussing the absence of an "act" requirement). Instead, the doctrine imposes a *duty* upon officers to investigate and prevent violations.

¹⁷⁰ The Supreme Court has created some exceptions to the *per se* illegality of price-fixing. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20-24 (1979) (holding that price-fixing for the purposes of introducing a new product is not *per se* illegal). *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (holding that restraints on price and output imposed by an athletic association are not *per se* illegal because most of its regulatory controls justifiably foster competition among amateur athletic teams).

¹⁷¹ Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 667 (2001) (noting that antitrust plaintiffs need only show intent to carry out a price-fixing plan and do not need to show that the plan was directed at achieving monopoly profits or another goal).

at issue.¹⁷² In other words, “if a defendant intends to fix prices, he necessarily intends to restrain trade.”¹⁷³ But proving that the officer participated in an illegal agreement is difficult. It is often the case that senior corporate officers plan a price-fixing conspiracy, yet leave the actual execution of the conspiracy to subordinates.¹⁷⁴ Yet a corporate officer can only be liable if it is proved that he authorized, ordered, or helped to perpetrate the conspiracy, a difficult burden.¹⁷⁵

As we have seen, it is extremely difficult to prove the officer’s authorization of illegal acts carried out by subordinates.¹⁷⁶ There must be strong evidence which would allow a reasonable jury to infer that the officer agreed to participate in the conspiracy,¹⁷⁷ such as the fact that the defendant officer attended meetings at which elements of the illegal conspiracy were discussed.¹⁷⁸ Although at least one court has refused to permit a corporate officer to escape liability by claiming that a conspiracy was conducted by subordinates without his knowledge,¹⁷⁹ the majority rule is that evidence of knowledge is insufficient. Rather, the prosecution must prove that the officer “consented” to the conspiracy, so that conviction cannot be based on “purely passive behavior.”¹⁸⁰

¹⁷² *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26 & n.59 (1940) (holding that the Sherman Act prohibits the mere act of conspiring to fix prices, irrespective of whether defendants had the power to accomplish their objective).

¹⁷³ *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

¹⁷⁴ *See, e.g.*, *United States v. Andreas*, 216 F.3d 645, 670 (7th Cir. 2000) (“Evidence at trial indicated that the details of the plan were arranged by upper management, but that all sides recognized that their corporate superiors remained in control of the deal and would be called in to settle any unresolved disputes.”).

¹⁷⁵ *United States v. Wise*, 370 U.S. 405, 416 (1962).

¹⁷⁶ *See supra* Part I.

¹⁷⁷ *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 n.5 (5th Cir. 1981).

¹⁷⁸ *See, e.g.*, *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 188 (3d Cir. 1970) (affirming conviction of company president liable where he attended several meetings at which price-fixing agreements were reached); *United States v. H & M*, 562 F. Supp. 651, 678 (M.D. Pa. 1983) (imposing liability where defendant president attended two meetings at which prices and customer allocation were discussed, including one meeting at which municipalities were allocated by actually drawing names from a hat).

¹⁷⁹ *United States v. Gillen*, 599 F.2d 541, 547 (3d Cir. 1979) *cert. denied*, 444 U.S. 866 (1979) (“When a company president has knowledge that his company is involved in a price-fixing conspiracy and takes no action to stop it, he may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates . . . If this were not the rule, the highest corporate officers would, in effect, be beyond the reach of the antitrust laws even when their companies are actively engaged in price fixing.”).

¹⁸⁰ *United States v. Brown*, 936 F.2d 1042, 1048 (9th Cir. 1990).

Thus the key issue is creating a nexus between the corporate officer and conspiring subordinates, such that the subordinates' participation in the conspiracy might be imputed to a senior officer. This is precisely the problem addressed by the RCO doctrine. If the RCO doctrine were applied in the antitrust *per se* context, courts could allow the officer's participation in the conspiracy to be imputed to him upon a showing of (1) a responsible relationship; (2) knowledge that his subordinates were involved in the conspiracy; (3) a failure to prevent the conspiracy. Such a result would comport with courts' repeated observation that illegal conspiracies cannot realistically be conducted without the knowledge of senior executives.¹⁸¹

V. CONCLUSION: IS THE RCO DOCTRINE AN UNWARRANTED EXPANSION OF CRIMINAL LIABILITY?

The RCO doctrine fills a doctrinal gap in the criminal law of corporate officers. Whether imposing criminal liability upon corporate officers is the best means of controlling corporate crime, as a policy matter, is beyond the scope of this Comment. Two concluding observations, however, are appropriate in order to clarify the purpose of the doctrine.

First, the RCO doctrine does not create any new crimes. Its function is to assign responsibility for conduct which has already been criminalized by statute.¹⁸² It performs this function by

¹⁸¹ Kadish, *supra* note 5, at 431 n.35.

¹⁸² This is particularly true in the context of "white-collar crime," an area in which the scope of unlawful practices is uncertain. See, e.g., OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES §5.04[1] at 5-29 (1990) ("Business crime statutes are not 'known' in the same way that lay people 'know' about murder or robbery. Legal uncertainty . . . in the views of experts is a good indication that the line between lawful and unlawful conduct is uncertain."). It is important to note that, because the RCO doctrine incorporates the *mens rea* requirement in the underlying statutory scheme, it would require a showing of scienter in a securities fraud case. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (holding that liability for securities fraud requires a showing of intent to deceive, manipulate, or defraud). Unlike public welfare cases, where the officer need only know of the conduct at issue (e.g. that his subordinates are dumping toxic waste) and is presumed to know that it is harmful, in a securities fraud case the prosecution must prove that the officer knows that the conduct is harmful to investors. For example, assume that the defendant officer is charged with issuing misleading statements in public filings. In such a case, the prosecution would have to prove that (1) the officer knew the critical "facts," i.e. the content of the relevant statements and the fact that they were to be included in public filings; (2) the officer knew that the statements were materially misleading or deceptive. In this

reformulating the common law requirement of a criminal act.¹⁸³ Instead of isolating a criminal *actus reus*, the doctrine seeks to extract criminal responsibility from a pattern of bureaucratic control. Conceding that documented authorization of a crime is unavailable, the doctrine focuses on a responsible relationship to the conduct of subordinates. The prevailing assumption is not that a new crime should be created, but that responsibility for an existing crime should not be evaded.

Second, the RCO doctrine provides a less costly alternative to the vicarious liability of corporations. The recent conviction of Arthur Andersen, which had 27,000 domestic employees, illustrates the high costs of corporate liability.¹⁸⁴ Like the RCO doctrine, corporate criminal liability is one response to the difficulty of proving that corporate officers authorized criminal acts.¹⁸⁵ But convicting the entire corporation imposes higher social costs than convicting the officers who are truly blameworthy. If current doctrine makes it all but impossible to prosecute sophisticated crimes by corporate officers, then the doctrine should be changed. The corporation should not pay the price for the antiquated state of the law. If it is true that "the only way in which a corporation can act is through the individuals who act on its behalf,"¹⁸⁶ the law must isolate the individuals who are responsible.

hypothetical, the critical advantage of the RCO doctrine is that the prosecution need not prove that the officer *created, authorized, or ratified* the statements in any way. Instead the doctrine would impose a duty upon the "responsible" officer to have *prevented* the issuance of the statements.

¹⁸³ See *supra* note 6 and accompanying text.

¹⁸⁴ See Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. Times, June 16, 2002.

¹⁸⁵ See, e.g., Kathleen F. Brickey, *Close Corporations and the Criminal Law: On "Mom and Pop" and a "Curious Rule,"* 71 WASH. U. L. Q. 189, 193 (1993) (noting that the ease with which wrongdoing can be concealed in an organizational setting is another reason corporate criminal liability is recognized).

¹⁸⁶ *Dotterweich*, 320 U.S. at 281.

